STATE OF ALASKA
(ANNA NICK)

IBLA 90-22 Decided October 31, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, modifying an earlier decision which had, in part, rejected that portion of the Pilot Station Townsite petition (F-33190) conflicting with Native allotment application F-17695.

Appeal dismissed.

1. Administrative Procedure: Standing--Res Judicata--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Standing to Appeal

   The State of Alaska made no showing that it was adversely affected by a BLM decision clarifying an earlier decision rejecting a townsite petition to the extent that it conflicted with a Native allotment. The clarification of the earlier administratively final decision approving the Native allotment application on its merits does not afford the State an opportunity to reopen the earlier decision without a showing that the clarification affected the State's interests.

APPEARANCES: Martha T. Mills, Esq., Office of the Attorney General, State of Alaska, for the State of Alaska; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The State of Alaska (State) has appealed from an August 22, 1989, decision of the Alaska State Office, Bureau of Land Management (BLM), modifying an earlier decision, dated August 20, 1984. The earlier decision had rejected, inter alia, the petition for the Pilot Station Townsite (F-33190) to the extent of its conflict with Native allotment application F-17695, filed by Anna Nick (Nick).

On April 4, 1972, the Bureau of Indian Affairs (BIA) filed Native allotment application F-17695 on behalf of Nick pursuant to the Act of

May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). 1/ In her application Nick sought two tracts of land identified as Parcels A and B, claiming seasonal use and occupancy of the land for berry picking during the months of July and August since 1910. 2/

The BLM realty specialist conducted a field examination of Parcel A on June 27, 1980, and was accompanied by the applicant's husband. 3/ His report stated that the applicant, who was born on December 13, 1905, claimed to have visited the land on foot from her residence in the old village of Chakaktolik, prior to 1920. Later she moved to Pilot Station. The report confirmed the presence of berries on the claimed land, but the only improvement noted was a tent frame which had been rebuilt whenever needed.

At the time of the field investigation applicant was infirmed and her husband accompanied the field investigator and "confirmed" the location of the parcel (Field Report at 2). BLM set a brass-capped rod, with an attached tin collar and fluorescent cloth, to mark the location of the parcel and provided instructions for surveying the parcel by tying it to the marker. 4/

The field report noted that a portion of the approximately 40 acres in Parcel A, estimated to be about 17 acres, overlapped an area described in the petition for the Pilot Station Townsite, which was occupied by an airport leased to the State Division of Aviation (the administrative agency is now referred to as the Department of Transportation and Public Facilities (DOTPF)) (F-35212). 5/ The report stated that "[i]t appears that the applicant has a valid existing right for subsistence use on the parcel since at

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1/ The Act of May 17, 1906, was repealed (subject to then pending applications) effective Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988).

2/ Parcel A was described as situated in the W½ SW¼ SW¼ sec. 5 and the E½ SE¼ SE¼ sec. 6, T. 21 N., R. 74 W., Seward Meridian, Alaska. Parcel B was described as situated in the SW¼ SE¼ and the W½ SE¼ SE¼ sec. 5, T. 19 N., R. 79 W., Seward Meridian, Alaska. At the time of application the land was unsurveyed.

3/ BLM conducted a similar examination of Parcel B the same day.

4/ Starting at the BLM marker and proceeding southerly about 845 feet one would come to "Corner #2 of Tract 'C', U.S. Survey 4489, * * * the true point of beginning." By continuing on the same bearing for approximately 475 feet one would come to corner #1 of the allotment. From corner #1 the boundary ran easterly approximately 1,320 feet to corner #2 of the allot-ment and then northerly approximately 1,320 feet to corner #3. From corner #3 the boundary runs westerly approximately 1,320 feet to corner #4 of the allotment which is "on the west boundary of aforesaid Tract 'C'," then southerly to the true point of beginning (Field Report at 4).

5/ The area leased to the State for an airport was surveyed as a part of the 1968 Pilot Station Townsite survey, which was accepted Jan. 15, 1971 (U.S. Survey No. 4489, Alaska). The airport was described as Tract "C,"

least the 1920's" (Field Report at 4). On March 6, 1984, BLM received affidavits, dated February 24, 1984, from several witnesses who also claimed land adjacent to that claimed by Nick, viz., Christine M. Wasiky, Mary Wassillie (Nick's daughter), and Mary Joseph. These affidavits attest to Nick's continuous use of the land for berry picking since before 1950. All three witnesses place her claim partially within the site of the Pilot Station airport. In his field report the field investigator recommended that BLM acquire the area in conflict by securing a relinquishment of that land from Nick "by means of a land trade or value reimbursement" in order to provide for "continued airport service." Id.

On May 15, 1981, DOTPF filed a protest of approval of Nick's Native allotment application for Parcel A pursuant to section 905(a)(5)(C) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5)(C) (1988). 6/ The protest precluded legislative approval of the application under that statute (see 43 U.S.C. § 1634(a)(5) (1988)), making it necessary to adjudicate the application pursuant to the Act of May 17, 1906. See William J. Felix, 114 IBLA 86, 89 (1990).

A BLM decision was issued on August 20, 1984. This decision stated at pages 2-3: "Based upon adjudication of the application, it has been determined the applicant has used the lands applied for and satisfies the use and occupancy requirements of the Native Allotment Act of 1906. Native allotment application F-17695 (Anch.) is held for approval as to the land described above as Parcels A and B." (Emphasis added.) BLM noted, however, that the land had been classified as valuable for oil and gas, which would be reserved to the United States in the absence of reclassification.

BLM also considered the conflicting applications for a portion of Parcel A, noting that Nick's use and occupancy predated the conflicting applications. It "rejected" the Native village selection applications of Pilot Station, Inc. (PSI) (F-14918-A and F-14918-A2), filed November 18, 1974, and December 15, 1975, to the extent of the conflict with Nick's Parcel A. Id. at 3. BLM found the petition for the Pilot Station Town-site, filed July 15, 1964, to be "held for rejection in part as to [parcel A] and all the minerals therein except oil and gas." Id. (emphasis added). Nick's Native allotment application was "held for approval" because Nick's

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fn. 5 (continued)
containing 103.29 acres. When Nick's application was originally plotted on the master title plat (MTP) for the unsurveyed township (T. 21 N., R. 74 W., Seward Meridian, Alaska) on Apr. 3, 1972, BLM placed it north of Tract "C." Based on the June 1980 field examination, the location was corrected and subsequent MTP's reflect the conflict with Tract "C." See Short Note Transmittal, dated July 2, 1984.

6/ In filing its protest the State asserted that Nick "is not entitled to the land described in [her] allotment application and that said land is the situs of improvements claimed by [the State]." The "improvements" were undoubtedly the airport facilities built by the State in 1964. See Supplemental Statement of Reasons for Appeal (SOR) at 2.

use and occupancy predated the April 7, 1966, State application for a pub-lic airport lease (F-35212). 7/ Id. at 4. BLM stated that it would survey Nick's allotment prior to issuing a certificate of allotment, noting that "[t]he survey of the land will be done in the regular order of business, but may require several years due to the large number of allotments already scheduled." Nick was to be notified when the official plat of survey was filed.

Finally, BLM's August 1984 decision stated that all of the "addressed parties" would have 60 days to file a private contest against the Native allotment application and that all other parties could appeal the decision to this Board. The decision was served upon the Townsite Trustee, PSI, and DOTPF, but there is no record of any of these parties having initiated a private contest and there is no indication that an appeal was taken from the August 1984 decision. See Short Note Transmittal, dated Dec. 29, 1988.

On January 25, 1985, DOTPF submitted a letter to BLM asking for expeditious resolution of various outstanding conflicts between State airports and Native allotment claims (including the conflict between Nick's Parcel A and the Pilot Station airport). When noting the conflict between the Pilot Station airport and Parcel A of Nick's allotment application, DOTPF's list of conflicts stated: "Allotment approved 08/20/84." In a letter dated April 18, 1985, BLM responded to DOTPF's letter stating that "BIA is currently working on resolving the conflicts that still exist."

On July 7, 1987, BLM received a June 25, 1987, letter from Real Estate Services, Association of Village Council Presidents (AVCP), seeking to resolve the conflict. Attached to the letter was a handwritten statement by Nick agreeing to make the northern boundary of Parcel A "common with the airport USS 4489," pursuant to an attached metes and bounds description of the boundary common to the airport and her Parcel A. AVCP concluded by requesting an adjustment of the boundaries of Nick's allotment. BIA concurred with this resolution of the dispute.

The survey of Parcel A of Nick's allotment was completed before any action was taken by BLM in response to AVCP's July 1987 request for an allotment boundary adjustment. The land was surveyed between April and August 1987. Parcel A was bifurcated for survey purposes, with the por-tions of that parcel lying inside and outside the Pilot Station airport

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7/ In response to a State Division of Aviation application, BLM issued public airport lease F-35212 on Dec. 14, 1966, pursuant to the Act of May 24, 1928, as amended, 49 U.S.C. §§ 211-214 (1970). The lease was for a 20-year term and provided that, "if at the end of said period the lessor shall determine that a new lease should be granted, the lessee * * * will be accorded a preference right thereto upon such terms and for such dura-tion as may be fixed by the lessor." No new lease was issued. However, a 1-year permit was issued by the U.S. Fish and Wildlife Service, which had assumed jurisdiction over the land, effective Feb. 20, 1987. No permit or extension was issued after the 1-year period expired, but it appears that the State may be operating the airport. See Supplemental SOR at 2-3.

being plotted separately. The 25.59-acre portion conflicting with the airport was surveyed as lot 1 of Tract "C" of U.S. Survey 4489, and the 14.37 acres not in conflict was surveyed as lot 6 of U.S. Survey 8484. 8/ A short note transmittal, dated May 2, 1988, indicates that before BLM had formally accepted the surveys AVCP had indicated that its July 1987 request for adjustment of allotment boundaries should be "voided and disregarded." The noted reason was that "the land has been surveyed and this made the resolution useless, and the State of Alaska and AVCP are working on a solution for the applicant." Both surveys were accepted on October 24, 1988, and the plats were deemed officially filed on November 16, 1988.

On August 22, 1989, BLM issued its decision modifying the August 1984 decision and leading to this appeal. In its 1989 decision BLM noted that in the August 1984 decision it had rejected the Pilot Station Townsite petition to the extent of the conflict with Parcel A of Nick's Native allotment application, but that "[i]n error the townsite petition was not rejected as to the oil and gas" (Decision at 1; emphasis added). Thus, BLM "modified" its August 1984 decision, noting that the August 1984 decision applied only to Nick's Native allotment, and rejected the townsite petition as to the land in Parcel A and "all the minerals therein." Id. at 2. The State filed a timely appeal from the August 1989 BLM decision. 9/

[1] A significant procedural question must be addressed before considering the merits of this appeal. To appeal from a BLM decision a party must be adversely affected by that decision. See 43 CFR 4.410(a); State of Alaska, 119 IBLA 260, 264 (1991). Therefore we must consider whether the State has standing to pursue this appeal.

8/ The State asserts at pages 4-5 of its SOR that BLM adopted conflicting special survey instructions for Parcel A of Nick's allotment application. We discern no conflict. BLM first lotted Tract C of U.S. Survey 4489, which was the portion of Parcel A within the previously surveyed airport site (U.S. Survey 4489). It assigned the balance of Parcel A a new survey number (U.S. Survey 8484). BLM issued special instructions, dated May 6, 1985, applicable to U.S. Survey 8484 and separate special instructions, dated May 9, 1985, applicable to U.S. Survey 4489. This procedure con-formed to the recommendation at page 4 of the July 1981 Field Report that the "portion of the subject allotment enclosed by [the] exterior boundaries of said Tract 'C' * * * be made a dependent survey of U.S. Survey 4489."

9/ In its notice of appeal the State stated that it was appealing from the Aug. 22, 1989, decisions. BLM had also issued a "Notice" on Aug. 22, 1989, conforming the description of Parcel A in Nick's allotment application to the surveyed description and affording her 60 days to object to the surveyed location of Parcel A. Although it appears that the State intended to appeal this notice, it later limited its appeal to the decision "which modified the BLM decision of August 20, 1984" (SOR at 1). Therefore, we will consider the State's appeal to be taken from the decision and not the notice. Had the State pursued its appeal from the August 1989 notice, we would have found that it lacks standing to appeal the notice, and we discern no way in which the State was adversely affected by the notice. An appeal from that notice would properly have been dismissed for lack of standing.

The decision before us was couched as a "modification" of BLM's August 20, 1984, decision to correct a perceived "error" in the 1984 decision. If considered alone, the phrase "and all minerals therein except oil and gas" in the portion of the August 20, 1984, decision addressing the Pilot Station Townsite application was susceptible to at least two meanings. Although, when considered as a whole, the 1984 decision was clearly intended to reject the townsite application as to the land embraced by Parcel A of Nick's Native allotment claim, it is obvious that BLM was concerned that the decision could be interpreted as a rejection of the Pilot Station Townsite application as to Parcel A, save its possible right to the oil and gas underlying that parcel. The second, and correct, interpretation of the 1984 decision was that the townsite application was being rejected as to Nick's allotment for Parcel A, which was then deemed to include all minerals except oil and gas. 10/ Notwithstanding the language in that portion of the August 1984 decision pertaining to the townsite application, by reading the 1984 decision in its entirety it can be seen that the intent was to reject the Pilot Station Townsite petition to the extent it conflicted with Parcel A. Any rights the Pilot Station Townsite might have in and to the oil and gas beneath the remainder of the townsite was to be determined at a later date. It would have been more accurate to couch the 1989 decision as a clarification rather than a modification of the 1984 decision.

The only matter "adjudicated" in the August 1989 decision was the townsite's ownership of oil and gas within Nick's Parcel A. This issue had nothing to do with the validity of Nick's Native allotment, which had been adjudicated in 1984. Considering the scope and impact of the August 1989 decision, we find no basis for concluding that the State was adversely affected by the August 1989 BLM decision. Not being affected by that decision the State lacks standing to challenge that decision, and its appeal must be dismissed. 11/ See Salmon River Concerned Citizens, 114 IBLA 344 (1990).

The State's lack of standing to challenge the August 1989 decision would seem to end further inquiry. Nevertheless, we will briefly consider a question raised by the State regarding the finality of the August 1984 BLM decision approving Nick's Native allotment application.

The appeal now before us cannot be construed as an appeal from the August 1984 BLM approval of Nick's Native allotment application. That

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10/ The 1984 decision had also offered Nick an opportunity to seek reclassification of Parcel A as not valuable for oil and gas. If reclassified as not valuable for oil and gas, there would be no reservation of oil and gas in the conveyance to Nick.

11/ We might also question the State's standing as operator of the airport, absent permit or lease from the Department affording a legally cognizable interest in the land. See, e.g., Eugene M. Witt, 107 IBLA 229, 231-32 (1989); Storm Master Owners, 103 IBLA 162, 177 (1988); In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982).

decision was served on the State on August 21, 1984. 12/ No appeal was taken by the State, and any right the State may have had to appeal that decision has been foreclosed under the doctrine of administrative finality, absent a compelling legal or equitable reason to the contrary. See State of Alaska, 117 IBLA 373, 376 (1991); Turner Brothers Inc. v. OSM, 102 IBLA 111, 121 (1988).

The State correctly notes that the August 1989 BLM decision characterizes the earlier decision as "approving" Nick's application in the case of Parcel A (Decision at 1). See also Short Note Transmittal, dated Dec. 29, 1988. The State argues that the August 1984 decision was not actually a final adjudication of Nick's allotment application because it merely held her application for approval. See SOR at 6. The August 1984 BLM decision was clearly a final decision at the time of the State's 1989 appeal. The language of that decision and subsequent actions taken by BLM and the State clearly support this conclusion.

There can be no doubt that BLM intended its August 1984 decision to become a final decision approving Nick's allotment application for Parcels A and B upon the expiration of the time granted for filing a private contest, if no private contest were filed. 13/ Immediately preceding the statement that it was holding Nick's allotment application for approval BLM outlined its adjudication of the application and its finding that Nick had satisfied the use and occupancy requirements of the Act of May 17, 1906. Following the statement that the application was held for approval, the decision stated that the remaining steps in the processing of her application would be surveying the land and issuance of a certificate of allotment. The decision then afforded adversely affected parties an opportunity to challenge the approval of Nick's application by filing a private contest within 60 days from the date of receipt of the decision and an opportunity to appeal to this Board by filing an appeal within 30 days. Based on the language of the decision, we conclude that the August 1984 BLM decision was clearly intended to be a final decision subject to the right to file a final contest and the right of appeal.

The State cites State of Alaska, 48 IBLA 229 (1980), and State of Alaska, 41 IBLA 309 (1979), in support of its contention that the August 1984 decision was an interim decision and that no "final" decision was issued until August 1989, or alternatively that no final decision had ever been issued. The cited cases addressed the issue of timely appeals. BLM had held allotment applications for approval and afforded the State

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12/ The record indicates service upon DOTPF, the named State agency in the August 1984 BLM decision.
13/ On Apr. 9, 1985, BIA filed Nick's original handwritten Native allotment application and requested that her application be "corrected." Nick had actually applied for three parcels totalling 160 acres but BIA failed to include a third 60-acre parcel near Parcel B in the typed application submitted to BLM. A BLM realty specialist examined this tract (Parcel C) on July 2, 1987, and found that Nick had also satisfied the use and occupancy requirements of the Act of May 17, 1906, for Parcel C.

time to file a private contest to protect its interest. The time for appeal to this Board did not commence until the time for filing a private contest had expired. 14/ See State of Alaska, 48 IBLA at 232; State of Alaska, 41 IBLA at 314. The decision now before us may have been couched as an interim decision only to the extent that the appeal period did not commence until the expiration of the period for filing a contest. We will therefore examine the effect of affording an opportunity to file a private contest.

The August 1984 decision afforded the State two opportunities. The first was an opportunity to challenge Nick's allotment application by filing a private contest. The State did not elect to file a private contest. When the time for doing so expired the decision could no longer be considered as interim, as that term is used in the two cases cited by the State. 15/ See, e.g., Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128, 132, 133 (1989). The second opportunity afforded the State was the opportunity to appeal to this Board, and the time for doing so began to run at the end of the period allowed for filing a private contest. See, e.g., State of Alaska, 42 IBLA 94, 96, 99 (1979). The State did not appeal from the August 1984 decision, the time for appeal passed, and the decision became administratively final.

The State explains that it did not appeal because BLM had not finally decided that Parcel A of Nick's application was within the airport. See SOR at 6-7. It asserts that when BLM does issue a final decision fixing the location of Parcel A in relation to the airport, the State should be afforded the opportunity to either file a private contest or appeal that decision. See SOR at 7. We do not accept the State's assertion that the August 1984 decision did not consider the conflict between her allotment claim and the airport. It did, and her rights were found to be superior. The decision afforded the State an opportunity to challenge the findings by filing a private contest and an opportunity to appeal to this Board. The State let both opportunities pass.

14/ Both of the cases cited by the State addressed the question of premature filing, rather than a filing many years after the issuance of the decision. Those cases correctly state that parties who are given 60 days to initiate a private contest have 90 days to appeal. A narrower interpretation would result in the absurd end result that a party not wishing to file a private contest to challenge the allottee's claim of right would not be able to challenge the decision on a strictly legal point because the time for appeal would expire before the party could exhaust the remedy afforded by a private contest. The cases cited by the State would be applicable if the State's appeal had been filed within 90 days from the date it received the August 1984 decision. The 90-day period has long passed.

15/ In this sense this decision is akin to a BLM decision holding an application for rejection. In those circumstances BLM has not finally rejected the application (giving rise to a right of appeal), but has afforded the applicant time for compliance before taking final action. At the conclusion of the compliance period the decision is final and an appeal may be filed. See, e.g., G. Donald Massey, 114 IBLA 209, 211 (1990).

From the time Nick's husband confirmed the location of the land claimed by her, during the June 1980 field examination, and BLM marked that location on the ground, BLM has recognized and identified a portion of Parcel A as being in conflict with the airport lease. The record discloses that all MTP's from and after July 5, 1984, show the conflict between the airport lease and the Nick allotment application. The State recognized the conflict when it filed its protest in May 1981, claiming improvements in the land (see also Jan. 25, 1985, Letter to BLM from Chief Right-of-Way Agent, DOTPF). The location of the claimed land was set out in the July 1981 Field Report and BLM's August 1984 approval of Nick's application specifically addressed the conflicting airport lease. Thus, the State has long held sufficient knowledge of the extent of the conflict to have the incentive to challenge Nick's allotment application. It failed to do so following the August 1984 BLM decision and cannot now be heard to complain that it has never had an opportunity to rebut the validity of Nick's Native allotment application. 16/ In May 1985 BLM issued special instructions for surveying Parcel A, including the portion in conflict with the airport lease. The surveys were undertaken between April and August 1987 and accepted in October 1988. Survey plats were deemed officially filed in November 1988. All that remains is issuance of the certificate of allotment pursuant to the August 1984 BLM decision.

In the face of the State's protests the evidence supports a finding that prior to the August 1989 decision the State also considered the August 1984 decision to be final. As noted previously, when DOTPF submitted its "up-to-date list of State airports which have Native allotment conflicts" it described the status of Nick's allotment application as: "Allotment approved 08/20/84." See Robert B. Ferguson, 23 IBLA 29, 33-34 (1975).

The State also argues that BLM improperly failed to give effect to Nick's June 1987 "relinquishment" of that portion of Parcel A in conflict with the State's airport lease (SOR at 7). It is true that the June 1987 statement signed by Nick indicated that she desired to resolve the conflict with the lease by making the northern boundary of her land correspond to the boundary of the airport. However, for this document to be considered

16/ The facts in this case are distinguishable from those in State of Alaska, 119 IBLA 260 (1991). In that case the BLM decision conformed a Native allotment application description to a subsequent survey. In doing so BLM drastically changed the location of the claimed land. Id. at 263. We held that BLM effectively allowed the applicant to amend her application to encompass land "which had not previously been described," without affording the State the opportunity to protest. Id. at 264. For this reason we found the State had standing to appeal. Id. In this case the State was not effectively denied an opportunity to file a protest when BLM conformed Nick's application to the surveys. There was virtually no change in the location of the claimed land as a result of the 1987 surveys, and the issues are the same as they were in 1984 when Nick's application was approved.

a valid relinquishment of all claim to the land in conflict, the relinquishment must have been knowing and voluntary. See Feodoria (Kallander) Pennington, 97 IBLA 350, 353-54 (1987). The relinquishment was conditioned upon the use of a common boundary line between the airport and Parcel A. When asked if Nick would be willing to accept the surveyed boundary in lieu of that set out in the relinquishment document in May 1988, BLM was advised by AVCP, the organization that negotiated the settlement leading to Nick's June 1987 conditional relinquishment, that this effort to resolve the conflict should be "disregarded" (Short Note Transmittal, dated May 2, 1988). The stated reason was that the survey had rendered the resolution "useless," and that the State and AVCP were once again working on a solution. 17/ Id. Accordingly, BLM was precluded from giving effect to Nick's relinquishment. It was withdrawn when the boundary was changed from that set out in the relinquishment document. All of this action took place prior to formal notation of her relinquishment. See 43 CFR 1825.1(b).

The State also challenges BLM's accepted 1987 surveys of Parcel A. See Supplemental SOR at 5. BLM counters by stating that an appeal of the survey acceptance is untimely because it notified the State on November 9, 1988, that the surveys had been accepted and that the survey plats would be deemed officially filed on November 16, 1988. See Answer at 4, 10-11. This notice afforded the State an opportunity to file objections to the survey and we are hard pressed to find the State's September 1989 objection to the surveys to be timely. See Peter Paul Groth, 99 IBLA 104, 108-09 (1987). Notwithstanding these obstacles, the State has presented absolutely no evidence that the surveys were not properly prepared, when it bears the burden of proving gross error or fraud. See Peter Paul Groth, supra at 111. For this reason alone, any challenge to the surveys must be dismissed. See Burton A. & Mary H. McGregor, 119 IBLA 95, 98 (1991).

Having found it appropriate to dismiss the State's appeal, we do not reach the questions of whether BLM properly concluded in August 1984 that Nick had satisfied the use and occupancy requirements for entitlement to a Native allotment under the Act of May 17, 1906, or whether it would be appropriate for BLM to initiate a Government contest challenging Nick's compliance with the Act. See, e.g., National Park Service, 118 IBLA 204, 208-09 (1991).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal from the August 1989 BLM decision is dismissed.

R. W. Mullen
Administrative Judge

17/ No further information regarding a possible settlement was received from the State, AVCP, or Nick. On Sept. 13, 1989, AVCP informed BLM that Nick agreed that her claimed land "w[as] in the correct place."

DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS CONCURRING IN THE RESULT:

In 1971, the Bureau of Indian Affairs forwarded to the Bureau of Land Management (BLM) the Native allotment a (F-17695), who claimed use and occupancy of various lands commencing early in the 20th century. Parcel A, descr included certain lands within the Pilot Station Townsite entry (F-033190), which in December 1966 had been leased to the S of Aviation, for operation and maintenance of an airport at Pilot Station. That airport lease (F-035212) had a term of 20 ye

In 1981, the State filed a timely protest of Nick's allotment application, pursuant to section 905(a)(5)(C) of the Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(C) (1988), asserting its interest in the airport lease. That protest preclude the application and required that BLM adjudicate the application pursuant to the Act of May 17, 1906. 2/

On August 20, 1984, BLM issued a decision concluding that Nick had satisfied the use and occupancy requireme it "held for approval" the land described in the application as Parcel A. It noted, however, that the land had been classified a and, in the absence of a favorable ruling on a petition for reclassification, the oil and gas would be reserved to the United S Allotment. In the same decision, BLM held for rejection the townsite entry to the extent of a conflict with Parcel A "and al oil and gas." 3/ Further, BLM held that Nick's use and occupancy of Parcel A predated the issuance of the airport lease to

The decision provided that the "addressed parties," which included the State of Alaska, Department of Transporta

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1/ By its terms that lease expired on Dec. 14, 1986. However, the State was subsequently authorized to use the airport fo Feb. 20, 1987. Since the expiration of that 1-year period, there has been no lease or other granting of an interest in that pro

2/ The Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), was repealed by sec Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), on Dec. 18, 1971, subject to applications then pending before t

3/ The apparent rationale for excepting oil and gas from the determination holding the townsite entry for partial rejection w the allotment applicant the opportunity to seek reclassification of the land for oil and gas. The exception was not warrante would be reserved to the United States, or, if BLM reclassified the land as not valuable for oil and gas, there would be no res The oil and gas would not pass under the townsite entry in any case.

(DOTPF), could file a private contest against the Native allotment application within 60 days of receipt of the decision, and th the right to initiate a private contest" of the decision could appeal to this Board. 4/ There is no evidence in the record of e the allotment or an appeal of that decision.

On November 9, 1988, the State received notice from BLM that the survey of Nick's Parcel A had been accepted c that the plats of survey would be officially filed on November 16, 1988. There is no record in the case file of the State filing of the plat.

On August 22, 1989, BLM issued a decision modifying the decision of August 20, 1984, in part. The 1989 decisi decision the Pilot Station Townsite entry had been rejected to the extent of its conflict with Parcel A of Nick's allotment a townsite petition was not rejected as to the oil and gas." The decision then stated: "The decision of August 20, 1984, is cor in [p]ertinent [p]art: 'Therefore, F-033190, Townsite Petition, is rejected in part as to the land described above in Native al A and all the minerals therein.' There are no further modifications" (1989 Decision at 2).

4/ In State of Alaska, 48 IBLA 229 (1980), and State of Alaska, 41 IBLA 309 (1979), the Board established a procedur between Native allotments and State interests. The Board stated that where BLM determined that the Native had satisfied the it should so notify the State and allow the State the opportunity to file a private contest, such notice being interlocutory a The Board concluded: "If the State elects not to do so [file a private contest], it may inform BLM or simply allow the time to will issue a decision concluding the adjudication. The State may appeal that decision to this Board." 48 IBLA at 231 (emp process provided for by BLM in the decision is at least arguably consistent with the first step of the practice established by t charges that no final decision on the allotment has been issued.

The 1984 decision, as it related to Parcel A of the allotment, was conditional. It did not approve the allotmen application for approval. It did not state that approval of the allotment application would become final without furth have triggered the right of appeal for the State following the expiration of the time for filing a private contest. See State of Al It provided the State with the opportunity to file a private contest, but it specifically excluded the State from that category of the decision. Nevertheless, I do not believe it is necessary to resolve the State's charge because the 1989 decision which is t appeal only relates to the townsite entry.

The State filed a timely appeal of the 1989 decision.

The initial question in this appeal, which was raised by BLM in its answer, is whether the State has standing to a correctly concludes that the State does not have standing. I agree with that conclusion, and, therefore, there is no reason to ments raised by the State in its statement of reasons.

As we have stated many times, 43 CFR 4.410 requires that one appealing a BLM decision must be both a party adversely affected by the decision. Kenneth W. Bosley, 102 IBLA 235, 236 (1988); Sharon Long, 83 IBLA 304, 307 (198 party to the 1984 decision and was served with a copy of that decision, it could be argued that it should be a party to any mod However, the modification did not relate to any State interest and BLM listed the parties to the decision as Nick, the Townsit of Pilot Station. Whether the State is a party to the case need not be finally decided, however, since it is clear that the State by the 1989 decision. 5/

The reason for such a conclusion is that the only determination made in the 1989 decision was to correct the r tion Townsite entry, as to the land in Parcel A, so that it covered all minerals therein, rather than excepting oil and gas fro a decision does not adversely affect the State. The State has no interest in the townsite entry. Moreover, the fact that at one ti for the land in question does not establish that it has a legally cognizable interest that is adversely affected by the 1989 decisi 107 IBLA 229, 231 (1989); In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982).

Finally, there is another basis for dismissing the State's appeal of the 1989 decision. The State has failed to poi the 1989 decision is in error. In such a situation, the appeal may be treated in the same manner as an appeal in which no state filed. United States v. DeFisher, 92 IBLA 226, 227 (1986), and cases cited therein.

5/ Although the State attempts to resurrect the substance of the 1984 decision, as it relates to Nick's Parcel A, through its app it clearly cannot do so.

6/ Actually, the 1984 decision stated that the townsite petition was "held for rejection," while the 1989 correction decision, w that condition and states that the petition "is rejected." The 1989 decision also stated that "[o]n August 20, 1984, a deci ing Native allotment application F-17695, Parcel A, pursuant to the Act of May 17, 1906." That statement was not a modi a mischaracterization of, the 1984 decision which, in fact, held the application for approval.

For the reasons set forth above, I concur in the result reached by the lead opinion.

Bruce R. Harris
Deputy Chief Administrative Judge

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